IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ANTHONY C. FLORES,
Defendant-Appellant.

Supreme Court Case No.: CRA07-004
Superior Court Case No.: CF0191-02

OPINION

Cite as: 2009 Guam 22

Appeal from the Superior Court of Guam
Argued and submitted on May 22, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Defendant-Appellant, Anthony C. Flores, appeals from a final judgment convicting him after a jury trial of the charges of Murder (as a 1st Degree Felony) and two special allegations (Possession and Use of a Deadly Weapon in the Commission of a Felony). On appeal Flores argues that: (1) his statutory right to a speedy trial under 8 GCA § 80.60 and his Sixth Amendment right to a speedy trial were violated; (2) the trial court erred in denying his motion for a new trial based on violations of 8 GCA § 70.10 and the seminal disclosure case of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) there was insufficient evidence to support the conviction; and (4) the trial court committed error in denying the motion for a new trial based on extrinsic information and in-trial publicity. For the reasons discussed below we reverse the judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On November 12, 1999, Guam Police Department ("GPD") Officer Jojo Garcia responded to an assault complaint at the Hamilton Hotel where Sherri Lea Taylor was residing. Officer Garcia saw Taylor's face when she first opened the door, and he noticed she appeared badly beaten with blood on her face. Transcripts ("Tr."), vol. XII at 85 (Jury Trial, Sept. 13, 2005). During his interview of Taylor, she said a man named "Ton" assaulted her. *Id.* at 91-92. Taylor also tried telling Officer Garcia the surname of her attacker. Because the assault to Taylor's face made her unable to speak clearly enough for Officer Garcia to understand, he initially thought Taylor said "Perez". *Id.* at 91. Taylor continued to shake her head no whenever Officer Garcia said Perez until Officer Garcia finally understood Taylor was saying "Flores". *Id.*

at 94. When Officer Garcia mentioned "Flores", Taylor acknowledged he was correct.[1] *Id.* Officer Garcia reported that Taylor told him she was struck several times in the face by the assailant's fists, was struck with a telephone and a chair, and was choked. *Id.* at 93. Taylor also described to Officer Garcia how Flores beat her. Guam Fire Department Emergency Medical Technicians (EMTs) also responded to the Hamilton Hotel to treat Taylor's injuries. The EMTs noticed Taylor's injuries, specifically the bruising to her face. Taylor told the EMTs that a man struck her with his hands, and a chair and strangled her with the telephone line. Tr., vol. XVII at 25-26 (Jury Trial, Sept. 20, 2005). That night Taylor was transported to Guam Memorial Hospital where she was seen in the emergency room and discharged a few hours later.

[3] The next day, Defendant-Appellant, Anthony C. Flores, was arrested, charged with aggravated assault of Taylor and confined. On November 14, 1999, Taylor's friends reported to GPD that others had threatened to harm Taylor. A few days later, Taylor was transported and admitted to Naval Hospital. The military doctors determined Taylor did not need surgery since she was presenting symptoms of what appeared to be severe liver failure and shock. Doctors found alcohol and Tylenol in Taylor's system and ultimately determined that her liver was failing and that she was dying. Tr., vol. XIV at 92-94 (Jury Trial, Sept. 15, 2005). On November 20, 1999, Taylor's organs shut down, and she died.

[4] On November 23, 1999, Dr. Arthur Lorezel performed the initial autopsy examination on Taylor. Soon after, on November 30, 1999, Dr. Aurelio Espinola did a second autopsy concluding Taylor died of blunt force trauma to her chest and abdomen area.

[1] Although Officer Garcia testified that Taylor meant Flores attacked her, he acknowledged on cross-examination that he did not include Taylor's mention of "Flores" in his police report. Tr., vol. XIII at 91 (Jury Trial, Sept. 14, 2005).

[5] Indictments were filed against Flores in four different cases. The first indictment filed in criminal case no. CF0700-99 charged Flores with attempted murder, aggravated assault and burglary. ER, tab 29 at 1 (Indictment, Nov. 23, 1999). The indictments in CF0458-00, CF0607-01, and CF0191-02 charged Flores with two charges of murder, as first degree felonies, and special allegations for possession and use of a deadly weapon in the commission of a felony. ER, tab 28 at 1 (Indictment, CF0458-00, Aug. 29, 2000); ER, tab 25 at 1 (Indictment, CF0607-01, Nov. 30, 2001); ER, tab 23 at 1 (Indictment, CF0191-02, Apr. 26, 2002). Flores has been incarcerated since his arrest.

[6] Flores filed a pre-trial motion asserting that his right to a speedy trial was violated and renewed the motion after trial. At trial, Flores moved for a mistrial based on mid-trial publicity and after trial filed a motion for a new trial on the same basis. Other post-trial motions filed by Flores included motions for a new trial based on violation of his Sixth Amendment right to a fair trial and discovery violations under 8 GCA § 70.10 and *Brady*. Flores also filed a motion for judgment of acquittal claiming insufficiency of the evidence. The trial court denied all of Flores' post-trial motions.

[7] A jury convicted Flores of murder and two counts of possession and use of a deadly weapon. A judgment of conviction was entered on March 19, 2007, and Flores timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over this appeal from a final judgment of conviction. 48 U.S.C. § 1424-1(a)(2) (2007); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] A trial court's denial of a defendant's motion to dismiss on statutory speedy trial grounds is reviewed for an abuse of discretion. *People v. Nicholson*, 2007 Guam 9 ¶ 8. We review *de novo* a defendant's Sixth Amendment speedy trial claim. *People v. Mendiola*, 1999 Guam 8 ¶ 22. Denial by the trial court of a motion to dismiss an indictment is reviewed for an abuse of discretion. *People v. Gutierrez*, 2005 Guam 19 ¶ 13. The standard of review for a denial of a motion for mistrial is abuse of discretion. *Caston v. State*, 823 So. 2d 473, 492 (Miss. 2002). A denial of a motion for a new trial is reviewed for an abuse of discretion. *People v. Quinata*, 1999 Guam 6 ¶ 16. This also applies when the motion for a new trial is based on trial publicity. *See State v. Manuel*, 408 So. 2d 1235, 1238 (La. 1982). "Whether a Brady violation requires a new trial is reviewed for abuse of discretion." *State v. Wilson*, 200 P.3d 1283, 1292 (Kan. Ct. App. 2008).

[10] Finally, claims of insufficient evidence are matters of law that are reviewed *de novo*. *See People v. Maysho*, 2005 Guam 4 ¶ 6 ("If a defendant preserves the claim of sufficiency of the evidence by filing a motion for acquittal, the standard of review on appeal is *de novo*."); *see also United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004) (Claims of insufficient evidence are reviewed *de novo*). "When a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this court reviews the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Flores*, 2004 Guam 18 ¶ 6 (quoting *People v. Reyes*, 1998 Guam 32 ¶ 7 (citations omitted)).

IV. DISCUSSION

[11] On appeal, Flores claims: (1) his statutory and constitutional speedy trial rights were violated; (2) the trial court erred in denying his motion for a new trial based on violations of 8 GCA § 70.10 and *Brady*; (3) there was insufficient evidence to sustain the conviction for the murder charge; and (4) the trial court erred in denying the motion for a new trial based on the jury's exposure to extrinsic information and in-trial publicity. Although the judgment is reversed on one ground, we address the merits of each argument, because they could be dispositive and may be raised again during any new trial.

A. Speedy Trial Violations

1. Statutory Right to a Speedy Trial

[12] Flores first argues his statutory speedy trial right was violated because the trial court failed to bring him to trial within the time prescribed under 8 GCA § 80.60, and no good cause was shown for the almost six-year delay in starting his trial. Indictments were filed against Flores in four different cases. The first indictment filed in CF0700-99 ("first indictment") on November 23, 1999, charged Flores with attempted murder, two charges of aggravated assault, and burglary. ER, tab 29 at 1 (Indictment, CF0700-99, Nov. 23, 1999). The charges in the second, third, and fourth indictments are two charges of murder as first degree felonies, and special allegations for possession and use of a deadly weapon in commission of a felony.[2] ER, tab 28, at 1 (Indictment, CF0458-00, Aug. 29, 2000); ER, tab 25 at 1 (Indictment, CF0607-01, Nov. 30, 2001); ER, tab 23 at 1 (Indictment, CF0191-02, Apr. 26, 2002).

[2] The second indictment was filed on August 29, 2000 in CF0458-00. The third indictment was filed on November 30, 2001 in CF0607-01. The fourth indictment was filed on April 26, 2002 in CF0191-02.

[13] Flores acknowledges the charges in the first indictment are different from the charges in the subsequent indictments and therefore concedes his speedy trial calculation should begin with the second indictment. Appellant's Br. at 11 (Feb. 11, 2008). Flores asserts there was a delay of 529 days with no good cause shown from the arraignment in the second indictment. *Id.*

[14] The Government also concedes the calculation does not start with the first indictment. Since the later indictments charged Flores with a new crime, but does not agree with Flores that the speedy trial calculation starts with the second indictment. Appellee's Br. at 9 (Apr. 14, 2008). Instead, the Government argues Flores' speedy trial calculation starts with the fourth indictment as the second and third indictments were dismissed without prejudice for the same reasons. Even if there was a delay, the Government contends good cause was shown for the delay.

[15] To determine whether a statutory violation occurred under section 80.60, we must first decide which arraignment date controls the speedy trial calculation. Both parties agree that the speedy trial calculation does not begin with Flores' arraignment in the first indictment.[3] On August 29, 2000, the second indictment issued, charging Flores with different crimes than those charged in the first indictment. ER, tab 28 at 1 (Indictment, CF0458-00). On September 28, 2001, Flores filed a motion to dismiss the second indictment for failure to present exculpatory evidence. However, at the motion hearing on November 23, 2001, the Government requested to dismiss the indictment but indicated its intent to re-indict Flores. ER, tab 24 at 3 (Dec. & Order, Apr. 15, 2002).

[3] On December 28, 2001 the parties signed and submitted to the trial court a stipulation to dismiss the first indictment which was later filed on January 18, 2002. The first indictment was dismissed by stipulation on December 21, 2001. ER, tab 26 at 1 (Jan. 8, 2002).

[16] On November 30, 2001, the third indictment was filed, charging Flores with the same crimes as the second indictment. ER, tab 25 at 1. Flores moved to dismiss the third indictment on February 7, 2002, as defective for failure to adequately apprise defendant of the offenses charged and on March 15, 2002, for failure to present exculpatory evidence. Both motions were granted by the trial court on April 15, 2002. ER, tab 24 at 16 (Dec. & Order, Apr. 15, 2002). Eventually, the grand jury returned a fourth indictment on April 26, 2002, charging Flores with the same charges as the second and third indictments. ER, tab 23 at 1.

[17] Flores relies on *United States v. Karsseboom* to support his argument that his speedy trial calculation begins with the second indictment. 881 F.2d 604 (9th Cir. 1989). In *Karsseboom*, the original indictment charged the defendant with eight counts, including one count of mail fraud. *Id.* at 605. Prior to trial, the court dismissed seven of the eight counts. *Id.* at 606. A superseding indictment was filed which included the eighth count of the original indictment. *Id.* The defendant appealed his conviction arguing he was not brought to trial within seventy days from indictment or arraignment mandated by the federal Speedy Trial Act. *Id.* The court held that where a "trial court dismisses some but not all counts of an indictment, and a defendant is reindicted on the dismissed counts, the retained count and the superseding indictment both inherit the 70-day clock applied to the original indictment."[4] *Id.* at 607. The court stated, "[w]hen a superseding indictment merely corrects technical errors but charges again the same offenses the 70-day clock continues and does not begin anew unless the original indictment in its entirety has been previously dismissed." *Id.* Ultimately, the court concluded the original

[4] The court noted that the 70-day period would have restarted upon the filing of the superseding indictment if the trial court dismissed all eight counts of the original indictment. *Karsseboom*, 881 F.2d at 606.

indictment date controlled because the superseding indictment was in effect, the same as the original indictment. *Id.*

[18] However, *Karsseboom* is inapposite because at case addressed the effect of the filing of a superseding indictment after a dismissal of some but not all counts of the original indictment and involved the federal Speedy Trial Act, not Guam's speedy trial statute. A superseding indictment is an indictment filed before the original or underlying indictment is dismissed. *United States v. Rojas-Contreras*, 106 S. Ct. 555, 559 (1985) (Blackmun, J., concurring in the judgment). In a reindictment case, a new indictment is filed when the original or underlying indictment or charges are dismissed. *Id.* Although four indictments were returned against Flores, the indictments were not superseding indictments. When the third indictment issued on November 30, 2001, the second indictment was presumably dismissed on November 23, 2001. Similarly, when the fourth indictment issued on April 26, 2002, the third indictment was dismissed on April 15, 2002. And unlike *Karsseboom*, the dismissal of the second and third indictments did not retain any charges from the previous indictments.

[19] *Karsseboom* is also not instructive because it involves the applicability of the federal Speedy Trial Act which provides specific statutory language when calculating a speedy trial clock.

[20] Specifically, 18 U.S.C.A. § 3161(d)(1) reads:

> If any indictment or information is dismissed upon motion of the defendant, . . . and thereafter . . . an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c)[5] of this section

[5] Subsections (b) and (c) provide:

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no

> shall be applicable with respect to such subsequent . . . indictment, or information, as the case may be.

18 U.S.C.A. § 3161(d)(1) (Westlaw 2008) (footnote added).

[21] Where the federal government moves to dismiss the indictment, the Act excludes the period of delay from the dismissal of the original indictment to the filing of the subsequent indictment charging a defendant with the same offense, or any offense required to be joined with that offense. 18 U.S.C.A. § 3161(h)(5) (2008). Under the Act, the speedy trial clock resumes running at the time the new indictment is filed, *United States v. Hoslett*, 998 F.2d 648, 658 (9th Cir. 1993), and "any unexcluded speedy trial time from the dismissed prosecution is carried over to a reprosecution." *United States v. Giambrone*, 920 F.2d 176, 179 (C.A.2 N.Y. 1990). However, when an indictment is dismissed at the defendant's request, the speedy trial clock restarts when the new indictment is filed. 18 U.S.C.A. § 3161(d); *United States v. Dennis*, 625 F.2d 782, 793 (Mo. Ct. App. 1980).

[22] Guam's law, 8 GCA § 80.60, does not have similar language specifically requiring that the speedy trial clock be restarted or the delay from dismissal to subsequent indictment be excluded, depending on whether the Guam government or defendant obtained the initial dismissal. The federal cases which evaluate whether a new indictment restarts or resumes the speedy trial time when a prior indictment was dismissed either by the federal government or by

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grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C.A. § 3161.

the defendant rely exclusively on the language in the federal Act. These holdings are based on express statutory language, and therefore, they are not persuasive when applying section 80.60.

[23] Section 80.60, provides that, unless good cause is shown, a defendant in custody must be brought to trial within forty-five (45) days after his arraignment. 8 GCA § 80.60 (2005). If a defendant is not brought to trial within the time prescribed and no good cause is shown, the trial court must dismiss the indictment. *Id.* The prosecuting attorney, prior to trial may dismiss with leave of court thus terminating the indictment. 8 GCA § 80.70(a) (2005). "The leave of court requirement was recognized as investing some discretion in the trial court when ruling on the prosecutor's motion to dismiss. This requirement was a departure from the common law right of the prosecutors to enter a *nolle prosequi*[6] and dismiss the case without first seeking leave of the court." *People v. Gutierrez*, 2005 Guam 19 ¶ 50. Dismissal under section 80.70(a) is derived in part from the original common law power of a prosecutor to dismiss a case pursuant to its *nolle prosequi* powers. *See* Notes, 8 GCA § 80.70, Notes (acknowledging that "[s]ection 80.70 continues the substance of a portion of former Rule 48. . . ."); *United States v. Salinas,* 693 F.2d 348, 350-51 (5th Cir. 1982) (indicating the distinction between the common law power to *nol pros* and the authority conferred under Rule 48). We have not previously addressed the effect on a defendant's speedy trial clock when an indictment is dismissed upon motion of the government, and a subsequent indictment for the same offense is filed. Having not addressed this issue, we look to the views expressed in other jurisdictions.

[24] The case of *Curley v. State*, describing the views followed by other jurisdictions, is instructive. 474 A.2d 502, 505 (Md. 1984). In *Curley*, the court organized the views into three

[6] "*Nolle prosequi,* translated from Latin, means 'to be unwilling to prosecute.'" *People v. Gutierrez*, 2005 Guam 19 ¶ 28 n.3.

separate categories. *Id.* Under the first view, the statutory time period begins to run from the date of the original indictment (or arraignment or first appearance of counsel), and is not tolled or ended by the entry of a *nolle prosequi*. *Id.* The statutory time period also continues to run if a defendant is reindicted for the same charge. *Id.* "The rationale for this approach appears to be that the [government] should not be permitted to avoid the effect of the running of the speedy trial period through the entry of a *nolle prosequi*." *Id.* at 506.

[25] Under the second view, courts look to the date of the original indictment, but toll the running of the statutory time for the period during which no indictment is outstanding, i.e., between charging documents. *Id.* The rationale for this second approach rests on two considerations: (1) the policy behind the speedy trial statutes would be subverted unless the defendant's time pending trial under the original indictment is included with the time pending trial under the reindictment; and (2) the time period between the two indictments ought not to count because upon entry of a *nolle prosequi*, no charges technically remain pending against a defendant, and the speedy trial clock runs only when charges against a defendant are pending. *Id.*

[26] Under the third view, when criminal charges are dismissed *nolle prosequi* and later re-filed, the time period for commencing a trial normally begins to run anew after the re-filing. *Id.* As explained in *Curley*, cases advancing this view appear to base their holdings on the nature and effect of a *nolle prosequi*. *Id.* at 507. The rationale for this third approach appears to be essentially commonsensical. Courts have found that "[a] dismissal without prejudice to refile the charges would have little meaning if it were not implied that the time limits of [statutory speedy trial rights] would begin anew upon refiling." *State v. Rose*, 121 Ariz. 131, 137 (1978).

[27] Guam's statutory *nolle prosequi* power under section 80.70 was formerly found in section 1385 of the Guam Penal Code, adopted directly from California and "continues the substance of a portion of . . . former § 1385."[7] *People v. Rios*, 2008 Guam 22 ¶ 24. The California courts fall under the third view and have held that the statutory time period for a speedy trial restarts when a new indictment is filed. *Bellizzi v. Super. Ct.*, 524 P.2d 148, 151 n.4 (Cal. 1974).; *see also People v. Allen*, 220 Cal. App. 2d 796, 800 (Cal. Ct. App. 1963) ("The institution of a new proceeding, in this case by the filing of an indictment charging robbery rather than an attempt, reinstated the 60-day period."). Courts adopting the second and third approach generally recognize an exception if the prosecution's action is intended or clearly operates to circumvent the statute or rule prescribing a time limit for trial. *Curley*, 474 A.2d at 507. The cases explain that the prosecution must be acting in "good faith" to prevent it from evading or circumventing the requirements of the statute or rule setting a deadline for trial. *Id.*

[28] We are persuaded by the reasoning of the cases that fall under the third view, including the California cases from which our statute originated, and find that where an indictment is dismissed *nolle prosequi* under section 80.70, and a defendant is reindicted for the same charges, the time period for starting a trial as prescribed under section 80.60 restarts when the subsequent indictment is filed. We are mindful however of a defendant's right to a speedy trial and recognize the exception applied in the cases above which prevents the speedy trial clock from restarting upon a *nolle prosequi* dismissal where "the prosecution's action is intended or clearly

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[7] In 1953, section 1385 read:

> **§ 1385. Court may, of own motion or on application of Island Attorney, order action dismissed.** The court may, either of its own motion or upon the application of the Island Attorney, and in furtherance of justice, order an action or information to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

Guam Penal Code § 1385 (1953).

operates to circumvent the statute or rule prescribing a time limit for trial." *Id.* at 507. The prosecutor must act in "good faith" or in a manner that neither evades nor circumvents the requirements of the statute or rule setting a deadline for trial. *Id.* "There may be circumstances justifying relief from an abuse of criminal process by the commencement of successive prosecutions. . . ." *People v. Godlewski*, 140 P.2d 381, 384 (Cal. 1943).

[29] On the day the trial court was scheduled to hear Flores' motion to dismiss the second indictment, the Government requested a dismissal of the indictment, indicating its intent to reindict Flores. In starting the speedy trial calculation with the fourth indictment rather than the second indictment, we rely on the fact that the second indictment's dismissal was a *nolle prosequi* dismissal under section 80.70 and that there has been no allegation of bad faith on the part of the prosecution in seeking the dismissal.[8] Flores does not argue on appeal that the Government in requesting the dismissal acted in bad faith. In the absence of evidence in the record of the prosecutor's motives in seeking dismissal of the second indictment, we are guided by a presumption of good faith on the part of the prosecution. *See United States v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988) (reviewing a dismissal under Rule 48(a), from which a portion of section 80.70(a) was modeled, the court found that if a defendant, without justification, does not contest dismissal, the presumption of good faith permits the court to dismiss without prejudice and the defendant waives his right to later object to the government's motives.) *United States v. Olson*, 846 F.2d 1103, 1114 (7th Cir. 1988).

[8] The issue of the Government's motives in seeking dismissal of the second indictment is not properly before this court. Flores did not appeal the trial court's grant of the dismissal of the second indictment. To claim the protections afforded under federal Rule 48(a), "a defendant must contest the government's motion to dismiss" at the time the dismissal is sought and also at the time of reindictment. *United States v. Reyes*, 102 F.3d 1361, 1367 (5th Cir. 1996). A review of the record before us does not show that Flores objected at the time of the Government's request for a dismissal and he did not raise the issue upon reindictment. Because the dismissal of the second indictment was not challenged before the trial court, any objection to the prosecution's motives in seeking dismissal of the indictment is deemed waived on appeal.

[30] A few days after the dismissal of the second indictment, a third indictment was filed for the same charges. Because the third indictment was dismissed upon motion by Flores, any delay in that case restarts the speedy trial clock. Therefore, we apply the third approach as discussed above and conclude that Flores' statutory speedy trial clock begins with his arraignment in the fourth indictment. Since we determine that the speedy trial clock starts from the arraignment in the fourth indictment in criminal case number CF0191-02, we now must address whether Flores was brought to trial within forty-five days after this arraignment and, if not, whether good cause was shown for the delay.

[31] A recitation of the events from the period between Flores' arraignment on the fourth indictment on May 8, 2002, and the start of his trial on August 30, 2005, as outlined in Attachment A to this opinion is helpful to determine whether a speedy trial violation exists. Our calculations reveal, as explained in Attachment A, that sixty-one days elapsed between Flores' arraignment in the fourth indictment and the start of his trial. Because Flores' trial did not commence within forty-five days after his arraignment, the court must dismiss the action, unless good cause is shown for the failure to commence the trial within the prescribed period. 8 GCA § 80.60(b)(3).

[32] "What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." *People v. Johnson*, 606 P.2d 738, 746 (Cal. 1980). When reviewing a trial court's exercise of that discretion, the appellate courts have evolved certain general principles. "The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss." *Id.* Delay for the defendant's benefit also constitutes good cause. "Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to

avoid dismissal." *Id.* Delay attributable to the fault of the prosecution or improper court administration, however, does not constitute good cause. *Id.* at 746-47.

[33] Flores relies on our holding in *People v. Nicholson,* where we found no good cause for the delay in bringing the defendant to trial under section 80.60 after the trial court took nine months to dispose of two of defendant's motions. 2007 Guam 9 ¶ 29. Finding no good cause, we remanded the case to the trial court to determine whether the dismissal should have been with or without prejudice. *Id.* In *Nicholson*, we stated that the "trial court failed to provide a reason to explain why the motion was not disposed of in a reasonable period." *Id.* ¶ 28. In fact, there was nothing in the record to justify the nine month delay by the trial court. *Id.* ¶¶ 21, 23, 25.

[34] The facts in this case are distinguishable from those in *Nicholson.* Unlike *Nicholson*, who filed only two motions, Flores required appointment of numerous counsel, filed numerous motions, went through a competency proceeding and had off-island expert witnesses, all of which caused a substantial amount of the delay-delay which was to his benefit. Given the copious defense motions and the other identified circumstances in this case, the trial court was diligent in disposing of the motions. The delays caused by consideration of Flores' motions therefore constitute good cause.

[35] There was, however, a period from February 14, 2005 to April 4, 2005 when no motions were pending. At the competency hearing on February 14, 2005, the trial court determined Flores was competent to stand trial. It then reconsidered the earlier motion to withdraw as counsel filed by Attorneys Terlaje and Phillips because of their inability to work with Flores. Dr. Kiffer testified about Flores' difficulty in communicating with his counsel. The testimony from Dr. Kiffer and counsels' arguments revealed that their relationship with Flores deteriorated. Flores also expressed to the court that he no longer wished to work with his attorneys. *See* Court

Minute Sheet of hearing held Feb. 14, 2005. As a result, the court granted the attorneys' motion to withdraw and appointed the Alternate Public Defender as Flores' new counsel. This was the eighth time an attorney was appointed for Flores. At the hearing, the court advised Flores to work with his newly appointed attorney and scheduled a hearing for April 4, 2005, to allow new counsel an opportunity to meet with Flores and review the case files in order to prepare for trial.[9]

[36] There was some delay from the time the Alternate Public Defender was appointed until the trial setting hearing in April 2005. However, if the reason for the delay is to benefit the defendant because defense counsel needs additional time to prepare the case or to secure witnesses, the case can properly be continued. *People v. Super. Ct. (Alexander)*, 37 Cal. Rptr. 2d 729, 738 (Ct. App. 1995).

[37] The Supreme Court of Arkansas in *Blackwell v. State* addressed whether a delay from the need for the appointment of new counsel is excludable as good cause. 1 S.W.3d 399 (Ark. 1999). In *Blackwell*, the court stated defendant "exhibited some difficulty in working with counsel; he had three attorneys, two of whom withdrew with the court's permission." *Id.* at 400. Trial was scheduled and at a hearing prior to the trial, a third attorney was appointed because defendant informed the court that his attorney betrayed him, he was afraid of his attorney, he believed his attorney failed to do any of the things a prudent attorney would have done, and he could not work with his attorney. *Id.* Prior to appointing new counsel, the court discussed with the parties the complexities of the case and how difficult it would be for new counsel to be prepared for the scheduled trial. *Id.* The trial court appointed counsel and reset the trial date almost four months later. *Id.* The trial court charged the 126-day delay to the defendant because

[9] At the trial setting hearing on April 11, 2005, the trial court inquired from Flores' new counsel, Attorney Phillip Tydingco from the Alternate Public Defender whether he had an opportunity to meet with Flores and review the three volumes of files. *See* Court Minutes of hearing held April 11, 2005.

of the problems he exhibited with his counsel and the Arkansas Supreme Court found this to be correct. *Id.*

[38] The court explained "when a delay results from the need for the appointment of new counsel, such appointment is excludable for good cause." *Id.* at 400-01. The court further elucidated that the "appointment of new counsel was required [because of defendant's] inability to work with his (second) counsel and because the State's case involved a 'massive' amount of documents, the trial court's action in ordering a continuance to permit new counsel additional time to prepare for trial was a delay for good cause attributable against [defendant] under Rule 28.3(h).[10]" *Id.* at 401. *see also Saffold v. State*, 521 So. 2d 1368, 1372 (Ala. Crim. App. 1987) ("[W]e find that appellant's 'irreconcilable differences' with his first attorney tolled the running of the statutory period. It is certainly appropriate to attribute this delay to appellant."); *State v. Moosey*, 504 A.2d 1001, 1004 (R.I. 1986) (change of counsel by defendant caused delay which was allowed by trial court in order to protect the defendant's rights and, thus, was not the kind of delay the Act was designed to protect against).

[39] Similarly, Flores' counsel renewed their earlier motion to withdraw from the case because of their inability to work and communicate with Flores. After hearing arguments from

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[10] Rule 28.3 of the Arkansas Rules of Criminal Procedure delineates the excluded periods of delay and subsection (h) excludes the delay for good cause shown and states in pertinent part:

> **RULE 28.3 EXCLUDED PERIODS**
>
> The following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant.
>
> . . .
>
> (h) Other periods of delay for good cause.

Ark. R. Crim. P. 28.3(h).

counsel and Dr. Kiffer's testimony at the competency hearing, the court reconsidered the motion and excused Attorneys Phillips and Terlaje. Although new counsel was appointed, the trial judge was aware that Flores sporadically asserted his speedy trial rights and advised him to work with his new counsel. Court Minutes of hearing held April 11, 2005.

[40] We believe it was proper for the trial court to continue the hearing until April 2005. The record supports a finding of good cause as it was necessary for the appointment of new counsel, because Flores expressed to the court his refusal to work with his attorneys. The continuance was also necessary to allow new counsel time to become familiar with the case and prepare for trial given the complexity of the case. Flores' new counsel had to review three volumes of files, depositions from expert witnesses and other discovery. Flores sought to benefit from the delay, and the delay was allowed in order to protect his rights. The reasons for the delay here were caused by Flores' conduct, and the delay benefited Flores, which constitutes good cause under section 80.60. *People v. Nicholson*, 2007 Guam 9 ¶ 14. In sum, although Flores' trial did not commence within forty-five days from his arraignment in the fourth indictment, good cause was shown for the delay, and Flores' statutory right to a speedy trial under 8 GCA § 80.60 was not violated.

2. Sixth Amendment

[41] We now turn to the question of whether Flores' constitutional right to a speedy trial was infringed. The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI; 48 U.S.C. § 1421(b)(u) (Westlaw 2009). As the United States Supreme Court stated in *Barker v. Wingo*, "It is . . . impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is

supposed to be swift but deliberate." 407 U.S. 514, 521 (1972). Therefore, the substance of the speedy trial right is defined only through an analysis of the peculiar facts and circumstances of each case.

[42] We employ the *Barker* four-part balancing test in evaluating a claimed speedy trial violation. Under the *Barker* test, the following factors are considered: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the presence or absence of prejudice resulting from the delay. *Id.* at 530. None of these factors alone, however, are dispositive. Rather, the factors must be considered together and balanced in relation to all of the relevant circumstances of the delay in bringing the defendant to trial. *Id.* at 533.

a. Length of Delay

[43] We begin our analysis with the first factor: the length of the delay. A constitutional right to a speedy trial cannot "be quantified into a specified number of days or months." *Id.* at 523. Rather, a balancing test weighing the conduct of both the prosecution and the defendant is necessary, and the length of the delay is measured from the time of indictment or arrest to the time of trial. *See generally Doggett v. United States*, 505 U.S. 647 (1992). The more serious or complex the charge, the greater the length of delay that will be tolerated. *Barker*, 407 U.S. at 530-31.

[44] Almost six years elapsed between Flores' arrest in November 1999 and the start of his trial.[11] Under the *Barker* analysis, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530. Here, a delay of almost six years is presumptively prejudicial; therefore, we proceed to

[11] Trial for the charges in the fourth indictment began on August 30, 2005.

examine the remaining *Barker* criteria. *See People v. Mendiola*, 1999 Guam 8 ¶ 24 (finding a four year and six month delay from the time of arrest to trial sufficient to trigger careful review of the other *Barker* factors).

b. Reason for Delay

[45] In analyzing the reasons for the delay, we examine which party was responsible for the delay. *Barker* identifies three types of reasons for delay: (1) deliberate delay, (2) negligent delay, and (3) justified delay. *Barker*, 407 U.S. at 531. Different weights are assigned different reasons for delay. *Id.* Deliberate delay which includes an "attempt to delay the trial in order to hamper the defense", *Id.*, or "to gain some tactical advantage over (defendants) or to harass them" is weighted heavily against the government. *Id.* n.32. Negligent delay is weighted less heavily against the government than is deliberate delay "but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* at 531. Justified delay, which includes such occurrences as missing witnesses or delay for which a defendant is primarily responsible is not weighted against the government. *Id.*; *Zumbado v. State*, 615 So. 2d 1223, 1234 (Ala. Crim. App. 1993) (quoting *McCallum v. State*, 407 So. 2d 865, 868 (Ala. Crim. App. 1981)) ("Delays occasioned by the defendant or on his behalf are excluded from the length of delay and are heavily counted against the defendant in applying the test of *Barker*.").

[46] Although the delay in this case appears inordinate, a review of the entire record demonstrates much of the delay was attributable to Flores. Trial dates were scheduled by the trial court on numerous occasions but had to be rescheduled for various reasons, most of which were attributable to Flores. Specifically, (1) multiple pre-trial motions filed by Flores, (2) withdrawal and appointment of eight attorneys, (3) off-island depositions of expert witnesses, (4)

Flores' interlocutory appeal, and (5) retention of an off-island expert witness. The trial court also ordered a forensic evaluation on Flores and conducted a competency hearing to determine whether Flores was able to stand trial. The record does not suggest any deliberate attempts by the Government or the trial court to delay the trial. The reasons for the delays here were primarily attributable to Flores' conduct and were to his benefit. This factor therefore, weighs heavily in favor of the Government.

c. Assertion of Speedy Trial Right

[47] Flores asserted his right to a speedy trial numerous times. These assertions however, were intertwined with waivers of speedy trial, numerous pretrial motions filed by Flores, depositions of off-island expert witnesses, the competency examination, retention of an off-island expert witness, and a stay pending the decision of the interlocutory appeal. While assertions of rights are entitled to strong evidentiary weight, they are to be viewed in light of defendant's other conduct. *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986).

[48] Flores first asserted his right to a speedy trial in CF0191-02 on May 8, 2002, but the statutory speedy trial clock was tolled on May 20, 2002, when he filed a motion for an expert witness. On July 25, 2003, Flores waived his speedy trial rights for two weeks. Prior to his waiver, Flores filed nine motions and an interlocutory appeal, conducted off-island depositions, and was appointed new counsel after his attorney at the time requested to withdraw. A second waiver was filed on February 4, 2004, and at a hearing on December 13, 2004, Flores again asserted his right to a speedy trial. Before his assertion on December 13, 2004, the trial court ordered a forensic evaluation on Flores and appointed new counsel based on a conflict with the previous counsel. Flores waived his speedy trial rights once more from April 4, 2005 to August 30, 2005. Prior to filing his waiver, a competency hearing was held and once again new counsel

was appointed because of Flores' inability to work with his previous counsel. Although Flores may have asserted his speedy trial rights, his assertions were intertwined with numerous waivers, motions filed, and a stay pending interlocutory appeal. As a result, this factor weighs only slightly in his favor.

d. Prejudice to the Defendant

[49] Finally, we examine whether Flores was prejudiced by the delay. A long, unexplained pretrial delay may give rise to a presumption of prejudice, *Dickey v. Florida,* 398 U.S. 30, 55-56 (1970) (Brennan, J., concurring), and shift the burden to the government to justify the delay. In evaluating prejudice, a court must consider three interests protected by the speedy trial right: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the defendant, and (3) limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. The most serious of these interests is the impairment of the defense "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* "The impairment nevertheless must be serious enough to amount to a constitutional deprivation." *United States v. Franco*, 112 F. Supp. 2d 204, 216 (D.P.R. 2000).

[50] Flores claims he was prejudiced by the length of his pretrial incarceration, from November 1999 to August 2005. Oppression, anxiety, and concern of a defendant incarcerated while awaiting trial are certainly present to some degree in every case. *Morris v. Wyrick*, 516 F.2d 1387, 1391 (8th Cir.1975). However, evidence of a lengthy pre-trial incarceration, standing alone, is insufficient to establish that a defendant's right to a speedy trial has been violated, *State v. Spivey,* 579 S.E.2d 251, 255 (N.C. 2003) "where . . . the defendant neither asserts nor shows that the delay weighed particularly heavily on him . . . ." *Morris,* 516 F.2d at 1391. Flores solely relies on the length of pre-trial incarceration and has failed to show how the delay was

unduly burdensome or oppressive to him. Because much of the delay, although lengthy, was attributable to Flores' conduct, we cannot find this factor weighs in his favor.

[51] Flores also argues the lengthy pre-trial incarceration exacerbated the anxiety and concern he had about his case, family, and lack of liberty. Appellant's Br. at 15. Some prejudice to a defendant in the form of anxiety is "inevitable simply by virtue of the existence of impending criminal charges." *Graves v. United States,* 490 A.2d 1086, 1103 (D.C. 1984). However, "[t]o establish prejudice based on anxiety, a defendant must do more than simply make an assertion but must show that the alleged anxiety and concern had a specific impact on [his] health or personal or business affairs." *Hammond v. United States,* 880 A.2d 1066, 1087 (D.C. 2005) (internal citation and quotation marks omitted). Flores has not claimed to have suffered any such particularized effects of anxiety.

[52] The third type of prejudice which is the most serious, focuses on whether the delay impaired Flores' defense. "[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655. In evaluating if a defendant must show particularized prejudice, the Supreme Court in *Doggett* looked to the first three factors and concluded, "When the Government's negligence . . . causes delay six times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Id.* at 658 (citation and footnotes omitted). Thus, unless the first three *Barker* factors all weigh heavily in favor of a defendant, the defendant must demonstrate actual prejudice. The first three *Barker* factors do not weigh heavily in Flores' favor, and as a result, actual prejudice is required before Flores is entitled to relief.

[53] Flores complains the delay caused the loss of evidence which prejudiced him. Specifically, he complains of the loss of the chair described as having Taylor's blood stains and GPD's failure to test the blood stains on the telephone. Because of the delay, Flores contends he could not scientifically test the blood stains on the chair and telephone to determine if another person's blood and/or fingerprints were present. Appellant's Br. at 15-16. In *People v. Mendiola*, the defendant argued the loss of the blood-stained shirt of the victim prejudiced his defense. 1999 Guam 8 ¶ 34. In determining whether the defendant was prejudiced, this court stated, "[c]onclusory allegations do not establish the required showing of prejudice", *Id.*, and in applying the *Barker* analysis concluded no Sixth Amendment violation was present.

[54] Here too, Flores claims the loss of the chair which was described as having the victim's blood stains and the failure of the Government to test the blood stains on the telephone prejudiced his case. However, Flores has not demonstrated how the loss of this evidence prejudiced him. Instead, Flores' assertion that his defense was impaired was supported only by vague, conclusory statements, unsupported by evidence, that the testing could have revealed another person's blood or fingerprints on the chair or telephone. Flores' conclusory statements do not establish the required showing of prejudice and therefore this factor does not weigh in his favor.

[55] Flores also argues the delay impaired his defense because of the unavailability of several witnesses at trial.[12] If a defendant complains the delay caused the unavailability of a witness and impaired his defense, the defendant must "state[ ] with particularity what exculpatory testimony would have been offered," and "[t]he defendant must also present evidence that the delay caused

[12] Flores' counsel submits the identities of the unavailable witnesses were discovered while preparing for trial. Appellant's Br. at 16.

the witness's unavailability." *Jackson v. Ray*, 390 F.3d 1254, 1265 (10th Cir. 2004) (first alteration in original) (internal citations and quotation marks omitted). Flores alleges the unavailable witnesses would have testified to allegedly making threats to Taylor and making statements to the police about Taylor's drinking problem. Flores asserts there would also have been testimony from the physician and nurse who treated and discharged Taylor from GMH, and testimony from the manager of Hamilton Hotel where the alleged incident occurred. Appellant's Br. at 16.

[56] Flores avers that all these witnesses left island and could not be located, but it is unclear from the record whether these witnesses became unavailable during the period of delay. Flores must point to specific facts in evidence and not just merely speculate what a witness may or may not have known. Even assuming the testimony of the unavailable witnesses were material to the instant case, Flores has not shown diligence in procuring the witnesses for trial as the record fails to indicate that the witnesses were subpoenaed. "Before such a contention will amount to 'some showing of prejudice,' the [defendant] must show that the witnesses are unavailable, that their testimony might be material and relevant to his case, and that he has exercised due diligence in his attempt to find them and produce them for trial." *Harris v. State*, 489 S.W.2d 303, 308 (Tex. Crim. App. 1973). Accordingly, Flores has not stated with particularity what testimony would have been offered nor provided any evidence that the delay caused the unavailability of the witnesses.

[57] Flores has failed to identify specific prejudice, and the other *Barker* factors do not weigh heavily in Flores' favor. Though the delay in bringing Flores to trial was long, it was not unreasonable because much of the delay resulted from Flores' actions. Under these circumstances, we cannot conclude that Flores' Sixth Amendment right to a speedy trial was

violated. Consequently, reversal of the judgment of conviction is not warranted on these grounds.

B. Discovery Violations

[58] Flores also claims the late disclosure of the identity of the Government's rebuttal witness, Ryan "Vanessa" Gebhart, violated the discovery rules under 8 GCA § 70.10(a)(7) and *Brady v. Maryland*, 373 U.S. 83 (1965). As a result, Flores contends that the trial court erred when it denied his motion for a new trial based on discovery violations. Appellant's Br. at 18.

[59] This court has not addressed the standard of review for a trial court's denial of a motion for new trial based on discovery violations, or, alternatively, the trial court's denial of a new trial as a discovery sanction. Either way this claim is cast, we review the trial court's denial of the motion for new trial for abuse of discretion. *See United States v. Brandao*, 539 F.3d 44, 64 (1st Cir. 2008) ("Review of the district court's decision to deny a defendant's motion for a new trial on the basis of alleged Brady violations is for manifest abuse of discretion"); *State v. Wilson*, 200 P.3d 1283, 1292 (Kan. Ct. App. 2008) ("Whether a Brady violation requires a new trial is reviewed for abuse of discretion"). To determine whether an abuse of discretion has occurred, we must first determine that a discovery violation involving *Brady* material occurred. Then, we will examine whether in denying the motion for a new trial, the trial court denied appropriate remedy to Flores.

[60] Guam's discovery statute codified as 8 GCA § 70.10 requires the prosecuting attorney to disclose "any material or information which tends to negate the guilt of the defendant as to the offense charged. . . ." 8 GCA § 70.10(a)(7) (2005). This section adopts the mandate originally articulated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *People v. Tuncap*, 1998 Guam 13 ¶

17. The protections afforded by section 70.10(a)(7) are equal to and not greater than those afforded by the Constitutional guarantee articulated by *Brady* and its progeny.

[61] Federal court decisions have articulated three elements that a defendant must prove to show a *Brady* violation. First, the suppressed evidence must be favorable to the accused. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Brady*, 373 U.S. at 87). Second, the evidence must have been suppressed by the government, either willfully or inadvertently. *See United States v. Agurs,* 427 U.S. 97, 110 (1976). Third, the suppressed evidence would deprive a defendant of a fair trial. *Bagley,* 473 U.S. at 676-78.

[62] However, a *Brady* violation does not occur if previously undisclosed evidence is disclosed during trial, unless the defendant is prejudiced by the delay in disclosure. *United States v. Word,* 806 F.2d 658, 665 (6th Cir.1986); *accord United States v. Coppa*, 267 F.3d 132, 140 (2nd Cir. 2001) (no Brady violation unless there is a "reasonable probability" that earlier disclosure of the evidence would have produced a different result at trial or at a plea proceeding); *see also Drew v. Collins,* 964 F.2d 411, 419 (5th Cir. 1992), *United States v. Dean,* 55 F.3d 640, 663 (D.C. Cir. 1995) (applying "reasonable probability" standard). Rather, in such a case, the appropriate standard to apply is essentially whether the disclosure came so late as to prevent the defendant from receiving a fair trial. *Bagley*, 473 U.S. at 674-78. If a defendant receives exculpatory evidence "in time to make effective use of it," a new trial is, in most cases, not warranted. *United States v. Paxson,* 861 F.2d 730, 737 (D.C. Cir. 1988).

[63] The record discloses that before Flores rested his case, the trial court inquired as to whether the Government had any rebuttal witnesses. The Government informed the court it would call Gebhart as a rebuttal witness, and Flores' counsel interviewed Gebhart before he testified. Tr., vol. XXIII at 27-28 (Jury Trial, Sept. 29, 2005). After the interview, Flores

objected to Gebhart testifying and argued, based on the brief interview with Gebhart, that it was apparent the Government failed to disclose exculpatory material evidence to the defense. Specifically, Flores relied on the written statement Gebhart claimed he made to the police on November 12, 1999 and the information provided to an investigator from the AG's office three weeks before the trial. *Id.* at 28. The exculpatory material which Flores uncovered during the interview was that Gebhart stated he did not see a man walk out of the room on the night of the alleged incident. *Id.* at 30. This statement contradicted testimony by Kimberly Caulkins Vawter, a key government witness. Flores maintains the Government knew of Gebhart's proffered testimony before presenting its case in chief. *Id.*

[64] Because the Government did not disclose the information prior to trial, Flores complains he could not make effective use of the evidence to prepare his defense and was not able to directly impeach Vawter or Officer Garcia with Gebhart's information because it was unknown until Gebhart was called as a rebuttal witness. Appellant's Br. at 25. The written statement to the police never materialized and the Government informed the court it could not find any statement by Gebhart, contending instead that Gebhart was mistaken about writing a statement. Nevertheless, Gebhart's recollection that he made a written statement to the police was uncontroverted. Moreover, the prosecuting attorney's obligation extends "to any material information in the possession or control of members of his staff and any other persons who have participated in the investigation or evaluation of the case and who either regularly report or with reference to this case have reported to his office." 8 GCA § 70.10(b).

[65] Although the written statement was never produced by the Government, Gebhart testified about the exculpatory information at trial. Gebhart testified that the information he provided at trial was the same information he provided in November 1999 and when interviewed by the

AG's investigator three weeks before the trial. Evidence known to the defendant or his counsel that is disclosed, even if at trial, is not considered suppressed under *Brady*. *State v. Walker*, 571 A.2d 686, 688 (Conn. 1990). Flores, therefore, has no basis for a claim of suppression. Rather, Flores may only complain of the timing of the disclosure. Under such circumstances, Flores must show that he was prejudiced by the failure of the Government to make Gebhart's information available to him at an earlier time. *Id.* at 689.

[66] The information provided by Gebhart that he did not see a man walk out of the room is evidence which tends to negate the guilt of Flores and was therefore exculpatory. At trial, Flores asserted that because of the late disclosure he was deprived of an opportunity to effectively use the information to impeach Vawter and Officer Garcia and also prevented from adequately preparing his defense. However, Flores' attorney interviewed Gebhart before resting his case and even with the information obtained did not request for a continuance or additional time to further prepare the defense. Additionally, Flores was not prevented from recalling Officer Garcia and Vawter because they were not excused from the trial and remained subject to recall.[13] Flores made no request to recall either witness. Flores did cross-examine Gebhart about the information and was able to make effective use of Gebhart's information. Tr., vol. XXIII at 64 (Jury Trial, Sept. 29, 2005).

[67] The standard we apply where disclosure of exculpatory evidence is presented at trial is whether the disclosure came so late as to prevent Flores from receiving a fair trial. After reviewing the record, we conclude that the belated disclosure of Gebhart's testimony did not prejudice Flores or deprive him of a fair trial.

[13] Officer Garcia and Vawter were included in the defense's witness list.

C. Sufficiency of the Evidence

[68] Next we examine whether the evidence was sufficient to support the conviction of Murder (as a 1st Degree Felony) and two counts of Possession and Use of a Deadly Weapon in the commission of a felony. Although Flores' conviction is vacated on other grounds, this court must still consider his arguments relating to the sufficiency of the evidence. *People v. Tennessen*, 2009 Guam 3 ¶ 11. Flores contends the evidence revealed numerous areas of reasonable doubt especially the evidence relating to causation. Flores argues the evidence was insufficient for several reasons. First, reasonable doubt existed as to whether Taylor died as a result of blunt force trauma to the chest and abdomen or from natural cause. Appellant's Br. at 28. Second, Flores argues the evidence could not support a finding that the injuries were inflicted on Taylor on the night of the alleged assault, November 12,1999. Third, Flores contends that although Dr. Aurelio Espinola testified that an assault to the abdomen with the leg of a chair could have caused the injuries, no evidence was presented at trial to show Taylor was hit with the leg of a chair.

[69] The Government generally argues the evidence was sufficient on the causation issue without any specific reference in the transcript to Dr. Espinola's testimony. Because Flores countered the medical evidence through the testimony of his expert witness, Dr. Joseph Cohen, the Government submits the jury was free to reject the defense's expert witness and agree with Dr. Espinola's testimony. Despite the competing testimony from the forensic pathologists, the Government asserts other indirect evidence of Flores' assault on Taylor was presented from the testimony of witnesses Kimberly Vawter, Officer Garcia, David Pocaigue, Anne Kenney, the EMTs and the forensic team. Appellee's Br. at 28.

[70] In *People v. Jesus*, this court stated, the standard when reviewing a sufficiency of the evidence claim is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt." 2009 Guam 2 ¶ 19. Further this court explained,

> The purpose of this standard is to "give[ ] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "[T]he factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Id.* at 319. This highly deferential standard is in place to ensure that the sufficiency of the evidence review only invades the province of the jury "to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319.

Id. ¶ 60.

[71] This court will not "substitute its judgment for that of the jury." *Id.* ¶ 61. When analyzing a sufficiency of the evidence claim, "courts determine whether there is sufficient direct and/or circumstantial evidence from which reasonable inferences can be drawn to support each element of the crime or crimes charged." *Id.* ¶ 62.

[72] Under 9 GCA § 16.40(a)(2) criminal homicide constitutes murder when " it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." 9 GCA § 16.40(a)(2) (2005). The evidence revealed that on November 12, 1999, Taylor was beaten in her hotel room at the Hamilton Hotel. As a result of the injuries sustained from the assault, Taylor was transported to GMH and discharged after a few hours. Taylor was admitted to the Naval Hospital five days later and died on November 20, 1999.

[73] Officer Garcia testified Taylor appeared badly beaten when he interviewed her in her hotel room on the night of the alleged incident. Tr., vol. XII at 85 (Jury Trial, Sept. 13, 2005). Officer Garcia also stated that Taylor said a man named "Ton" beat her and hit her with a chair.

Officer Garcia testified Taylor's speech was slurred and Officer Garcia thought Taylor said "Perez" but later realized Taylor meant to say "Flores". Tr., vol. XII at 91-95 (Jury Trial, Sept. 13, 2005); Tr., vol. XIII at 89-90 (Jury Trial, Sept. 14, 2005). On cross-examination, Officer Garcia admitted that he did not include the surname of the alleged attacker in his police report. Tr., vol. XIII at 90 (Jury Trial, Sept. 14, 2005). Officer Garcia also testified that Taylor identified several items in her room as belonging to Flores.[14] Tr., vol. XII at 104 (Jury Trial, Sept. 13, 2005).

[74] Kimberly Vawter testified that Ryan Gebhart came to her room and told her that some commotion was going on in Taylor's room. Tr., vol. XI at 29 (Jury Trial, Sept. 12, 2005). Vawter also testified after hearing what she described as a wheezing sound coming from Taylor's room, she followed Gebhart to Taylor's room. *Id.* at 30-31. Vawter testified she knocked on the door, *Id.*, and when the door opened, she saw Taylor on the floor with the phone cord wrapped around her neck and ankles. *Id.* at 45. Vawter further testified that she saw a man with tattoos who she later identified as Flores, walk out of the room wearing only blue jeans, no shirt and no shoes. [15] *Id.* at 43. After following Flores downstairs, Vawter stated Flores told her "she got what she deserved." *Id.* at 42. On cross-examination, Vawter testified she could not recall making this statement during her testimony before the grand jury. *Id.* at 102.

[75] David Pocaigue told the jury he saw Taylor and Flores leave the boat basin and noticed Flores was wearing a camouflage jacket. Tr., vol. XVII at 104 (Jury Trial, Sept. 20, 2005). When Flores returned later to the boat basin, David testified Flores was only wearing jeans and

[14] These items which were confiscated were a camouflage jacket, fishing pole, and pouch. *Id.* at 104.

[15] Although Vawter's testimony was contradictory to Gebhart's testimony that he did not see a man walk out of the room, the jury as the fact finder was able to weigh the credibility of the witnesses in deciding which witness to believe as instructed by the court.

was covered with blood on his body. *Id.* at 107-08. David also testified that he left the boat basin with his uncle Roman Pocaigue and Flores to the Hamilton Hotel so Flores could get his "stuff". *Id.* at 109. David testified that because the police were there, they dropped Flores at his home and after leaving Flores' home, David and his uncle Roman went to the Hamilton Hotel to inform the police they believed Flores may have assaulted Taylor. *Id.* at 110-111. David also testified that he recalled seeing Flores with the fishing rod, shoes, and camouflage jacket at the boat basin earlier in the evening and identified the same items in Taylor's room. *Id.* at 113.

[76] The medics who treated Taylor on November 12, 1999 testified that Taylor stated a male individual assaulted her and hit her with his bare hands and a chair, and also strangled her with a telephone. *Id.* at 25-26.

[77] On direct examination, Dr. Espinola, a forensic pathologist and the Government's expert, testified that Taylor had multiple lacerations which caused internal bleeding in the chest and abdomen area. Tr., vol. XVIII, 39-45, 48 (Jury Trial, Sept. 21, 2005). Dr. Espinola also noted Taylor had other injuries in the omentum, inside of the abdominal cavity, the back of her head and her neck area. *Id.* at 44-45, 48, 52. Dr. Espinola testified that in his opinion, the internal injuries and bleeding were caused by blunt trauma. *Id.* at 47. Dr. Espinola explained, because of the trauma, Taylor had extensive internal bleeding causing blood loss. *Id.* at 61. Further, that the small lacerations in the omentum caused a slow oozing bleeding and that a high amount of blood loss could lower a person's blood pressure and cause the organs to fail.[16] *Id.* at 61-63. When asked about his opinion on the cause of Taylor's death Dr. Espinola stated:

[16] When Taylor was first seen at GMH on November 12, 1999, her blood pressure was reported as 150 over 84. When Taylor was first admitted to the Naval Hospital four days later, her blood pressure was reported as 80 over 40. Dr. Cruz, an expert witness on gastroenterology also testified that Taylor's blood pressure of 80 over 40 was low and critical. Consistent with Dr. Espinola's testimony, *infra*, Dr. Cruz stated low blood pressure can be a symptom of someone experiencing shock due to loss of blood. *Id.* at 97.

> The death was caused by inter-thoracic - - that is inside the chest; retroperitoneal hemorrhage, or the back of the abdomen; and laceration of the omentum, with hemoperitoneum due to blunt trauma to the chest and abdomen.

Id. at 67.

[78] Stated simply, Dr. Espinola concluded that Taylor's death resulted from the blunt force trauma to the chest and abdomen area which could have been caused by a blunt object such as a chair. *Id.* at 55-56, 67. Although a microscopic examination of Taylor's organs, bruises or contusions was not conducted, Dr. Espinola stated this procedure was not necessary for every case. *Id.* at 114, 132.[17] Dr. Espinola testified it was not necessary because he was able to determine the aging of Taylor's bruises from the appearance and color. *Id.* at 114.

[79] Evidence on the amount of blood loss was also an issue which related to the cause of death. In his testimony, Dr. Espinola stated Taylor had 1,500 grams of yellow serosanguineous fluid in her chest cavity and abdomen area, and 350 grams of blood clot in her abdominal cavity. *Id.* at 39, 57-59. Dr. Espinola concluded the small lacerations in Taylor's omentum caused her to lose a significant amount of blood and the blood loss caused her blood pressure to drop. Because of her low blood pressure, Dr. Espinola explained Taylor's body went into shock and resulted in her organs failing, including her liver, which ultimately resulted in her death.

[80] To refute Dr. Espinola's testimony and present his theory of the case, Flores called Dr. Joseph Cohen, also a forensic pathologist, as his expert witness. Dr. Cohen's opinion was that Taylor died from natural causes and not from blunt force trauma. Dr. Cohen stated Taylor's liver

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[17] At trial when asked why a microscopic examination was not done in this case Dr. Espinola stated:

> Because the -- there was no gray area here. The timing here cannot be shortened. Like for instance, you know, I cannot say the difference between -- microscopically between two or three days. I can only make a timing, like for instance immediate or one week later. But in between, it's very difficult because the cells are already mixed. You know, you have a collection of cells that will tell you this is one day, two days, and three days. So I cannot narrow down shorter than one day.

Id. at 132.

problems caused her liver to fail and her organs to shut down. Dr. Cohen testified the lacerations in the omentum could result from severe amounts of force, for instance the type of force seen in traffic accidents or the fall from a building. Tr., vol. XXII at 121-22 (Sept. 28, 2005). Dr. Cohen stated on cross-examination that assuming Taylor was beaten with a chair, the amount of force from the hitting would not cause her death. Dr. Cohen further testified, if such a severe amount of force was applied to the omentum, other organs or areas in the abdomen would also show injuries.

[81] On cross-examination, Dr. Cohen agreed the loss of up to 1,500 or 2,000 grams of blood is sufficient to cause a person to go into shock and that it was possible the shock could cause multiple organ failures. *Id.* at 172. It was his opinion however, that Taylor's liver failure caused the shock. *Id.* at 174. Dr. Cohen also acknowledged that a microscopic examination was not necessary in all cases. *Id.* at 183.

[82] The expert witnesses who testified at trial offered conflicting opinions. "When expert witnesses offer conflicting opinions, it is solely for the jury to determine which expert is more credible." *People v. Unger,* 749 N.W.2d 272 (Mich. Ct. App. 2008). "The jury [is] not bound by the opinion of any one of the expert witnesses and could reject in whole or in part [the] opinion[s] regardless of whether they believe or disbelieve the subordinate facts on which the opinion was based." *State v. Avcollie,* 423 A.2d 118, 124 (Conn. 1979). "The issue, therefore, resolve[s] itself into one of credibility to be determined by the jury as trier of fact." *Id.*

[83] Although the Government has the burden to prove causation, "like every element of a crime, beyond a reasonable doubt, it does not follow that only medical testimony can prove causation, or that any medical testimony which is relied upon by the [Government] must be

framed specifically in terms of the beyond a reasonable doubt standard." *Commonwealth v. Ilgenfritz*, 353 A.2d 387, 390 (Pa. 1976).

[84] The jury believed that Taylor's death was caused by the trauma inflicted from the assault by Flores. The jury was also properly instructed on the weight to be given when resolving conflicting expert testimony. ER, tab 7 (Jury Inst. No. 3k, Oct. 10, 2005). While it is true that the testimony of the other witnesses may have conflicted, the task of resolving conflicts in the evidence, passing on the credibility of witnesses, or weighing the evidence is not the role of this court. This task is left for the jury as the trier of fact to decide, and the jury verdict must be sustained if, viewing the evidence most favorable to the Government, there is sufficient evidence to support it. *State v. Donnelson*, 402 N.W.2d 302, 309 (Neb. 1987). While the possibility exists that a "different finder of fact could have reached a different conclusion," *People v. Jesus*, 2009 Guam 2 ¶ 61, in viewing the evidence in a light most favorable to the Government we find the evidence sufficient to sustain the verdict.

D. Extrinsic Information

[85] Flores also argues a new trial is warranted because the jury was exposed to prejudicial and extrinsic information at trial, that is, the statement elicited from Officer Certeza that Flores' was known to have a violent past. Because we find as explained below, a new trial is warranted on other grounds, it is not necessary to address this issue on appeal.

E. Trial Publicity

[86] Of greatest concern is Flores' argument of prejudicial publicity during trial from statements made by the Government's key witness, Kimberly Caulkins Vawter, to a KUAM news reporter. Flores argues the mid-trial media reports may have prejudiced the jury. Flores asserts his Sixth Amendment right to a fair trial by an impartial jury was violated when the trial

judge failed to question the jury following potentially prejudicial publicity that arose during the trial. On the third day of trial, a KUAM news reporter interviewed Vawter after she testified for almost two days. ER, tab 10 (Decl. of Counsel, Sept. 14, 2005). That evening, the interview was featured on KUAM news. The next morning, Flores sought the following relief by motion: (1) an order to show cause or contempt proceedings on Vawter, (2) a mistrial or alternatively to strike Vawter's testimony, and (3) to voir dire the jury members individually to determine whether the jurors heard or read the news report or sequester the jury.[18] ER, tab 11 (Mot. for OSC, Mistrial, Voir Dire, Sept. 14, 2005). At the hearing, the trial court on the record granted Flores' request for an order to show cause hearing on Vawter, and set a hearing for a later date. Tr., vol. XIII, at 60 (Jury Trial, Sept. 14, 2005). The trial judge however, denied Flores's request to individually poll the jury observing that the jury had been admonished numerous times not to read or listen to any news reports relating to the trial. *Id.* at 60-63.

[87] After the jury returned its verdict, Flores filed a motion for a new trial and renewed his request to voir dire the jury. ER, tab 6 at 4 (Mot. for a New Trial, Oct. 17, 2005). Flores claimed that KUAM's report of Vawter's interview created highly emotional prejudicial publicity constituting a violation of his right to a fair trial. Flores requested that at a minimum, the trial court conduct a hearing to determine whether the jurors were exposed to the KUAM report and whether the matter was discussed during deliberations which in turn, could have affected the verdict, warranting a new trial. *Id.* In its decision and order the trial court stated Flores did not present independent evidence of the jurors' exposure to the news report. ER, tab 3

[18] After the motion was filed, Flores withdrew his request to sequester the jury. Tr., vol. XIII at 55 (Jury Trial, Sept. 14, 2005).

at 4 (Dec. & Order, Mar. 28, 2006). Consequently, the motion for a new trial was denied.[19] We review for an abuse of discretion the trial court's denial of the motion for a new trial based on mid-trial publicity.[20]

[88] At issue before this court is whether a new trial is warranted if the trial judge did not conduct a voir dire of the jury to determine whether any of the jurors had been exposed to extraneous highly prejudicial information during trial.

[89] The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury. U. S. CONST. amend. VI; *see also Turner v. Louisiana*, 379 U.S. 466, 472 n.10 (1965). The jury's verdict must be based solely upon the evidence presented at trial, and not on extraneous information. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). "The constitutional right to a fair trial is therefore implicated when a jury is exposed to extraneous information", *Dunlap v. People*, 173 P.3d 1054, 1091 (Col. 2007), and a mistrial is required if the misconduct of the jury prejudiced the defendant to the extent that he or she did not receive a fair trial. *United States v. Berry*, 627 F.2d 193, 197 (9th Cir.1980).

[90] This court has not previously addressed the proper procedure to be followed by a trial judge when potentially prejudicial publicity is brought to the court's attention during the trial. Therefore, we look to other jurisdictions for guidance. Courts in other jurisdictions have frequently recognized that publicity during trial generally presents a greater risk of prejudice

[19] The motion was filed on October 17, 2005 days after the jury returned its verdict and a hearing on the motion was held on November 30, 2005. Although Flores requested the trial court conduct an examination of the jury on the potential exposure to the mid-trial publicity, a decision and order on the motion was not issued until March 28, 2006. It is not clear from the decision whether the trial court specifically addressed and denied the request to voir dire the jury and on appeal, Flores did not request for the transcripts of the motion hearing.

[20] Although Flores moved for a mistrial upon learning of the mid-trial publicity, which was denied by the trial court on the record, on appeal, Flores does not challenge the denial of the mistrial but instead challenges the denial of his motion for a new trial. Therefore, we only address whether the trial court abused its discretion in denying the motion for a new trial.

than pre-trial publicity, and accordingly, apply a stricter standard for mid-trial publicity breaches, such as alleged here, than pretrial ones. *United States v. Sherman*, 440 F.3d 982, 988 (8th Cir. 2006) ("[p]ublicity during trial presents a greater risk of prejudice than pre-trial publicity . . .); *United States v. Williams*, 568 F.2d 464, 468 (5th Cir.1978) ("[I]nformation reported during the trial seems far more likely to remain in the mind of a juror exposed to it, and he may be more inclined to seek out this information when he is personally involved in the case."); *Levine v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 764 F.2d 590, 598 (9th Cir. 1985) (noting mid-trial publicity has a greater potential for prejudice than pre-trial publicity).

[91] Recognizing that this court has not previously established the procedure to be followed by a trial judge when addressing mid-trial publicity, we take this opportunity to set out a standard. Logic dictates that an initial determination of whether a jury has been exposed to the publicity is sometimes required in order to assess whether there has been actual prejudice to a defendant.

[92] Although the precise inquiry varies by jurisdiction, a majority of jurisdictions require a trial court to first determine the likelihood of prejudice resulting from such publicity. If prejudice is likely, then the majority require that the court at a minimum interrogate the jury collectively to determine who, if any, has been exposed. *See, e.g., United States v. Thompson,* 908 F.2d 648, 650-52 (10th Cir.1990); *Gov't of Virgin Islands v. Dowling,* 814 F.2d 134, 139-41 (3d Cir. 1987); *United States v. Halbert,* 712 F.2d 388, 389 (9th Cir. 1983); *United States v. Hood,* 593 F.2d 293, 296 (8th Cir. 1979); *United States v. Herring,* 568 F.2d 1099, 1104-05 (5th Cir. 1978); *United States v. Perrotta,* 553 F.2d 247, 250 (1st Cir. 1977); *United States v. Jones,* 542 F.2d 186, 194 (4th Cir. 1976); *Margoles v. United States,* 407 F.2d 727, 735 (7th Cir. 1969); *Brown v. State,* 601 P.2d 221, 232 (Alaska 1979); *Harper v. People,* 817 P.2d 77, 83-84 (Colo.

1991) (en banc); *Lynch v. State,* 588 A.2d 1138, 1139 (Del. 1991); *Way v. State,* 774 So. 2d 896, 898 (Fla. Dist. Ct. App.2001); *People v. Barrow*, 549 N.E.2d 240, 256-57 (Ill. 1989); *State v. Bey*, 548 A.2d 846, 866-67 (N.J. 1988); *Commonwealth v. Duddie Ford, Inc.*, 551 N.E.2d 1211, 1215 (Mass. App. Ct. 1990), *rev'd in part on other grounds by* 566 N.E.2d 1119 (Mass. 1991).

[93] These jurisdictions have adopted in some form the standard recommended by the ABA Standards for Criminal Justice, Fair Trial and Free Press.

[94] The relevant ABA Standard reads:

> If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or should on the motion of either party question each juror . . . about exposure to that material. . . . The standard for excusing a juror who is challenged on the basis of such exposure should be the same as the standard of acceptability recommended in standard 8-3.5(b)[21], except that a juror who has seen or heard reports of potentially prejudicial material should be excused if reference to the material in question at the trial itself would have required a mistrial to be declared.

ABA Standards for Criminal Justice, Fair Trial and Free Press § 8-3.6(e) (3d ed. 1991) (footnote added).

[95] The ABA standard involves a three-step process once potentially prejudicial publicity is brought to the court's attention during trial. First, the trial court determines whether the publicity is inherently prejudicial. Second, if prejudicial, the court then polls the jury collectively to assess whether any of the jurors were actually exposed to the publicity. Third, the court individually examines the exposed jurors to ensure that the fairness of the trial has not been compromised. Ideally, jurors should be questioned as soon as possible after potential exposure to assess any

[21] ABA Standard § 8-3.5(b) states that "[w]henever prospective jurors have been exposed to potentially prejudicial material, the court should consider not only the jurors' subjective self-evaluation of their ability to remain impartial but also the objective nature of the material and the degree of exposure. The court should exercise extreme caution in qualifying a prospective juror who has either been exposed to highly prejudicial material or retained a recollection of any prejudicial material." ABA Standards for Criminal Justice, Fair Trial and Free Press § 8-3.5(b) (3d ed. 1991).

prejudice. "Generally, it is incumbent upon counsel to make a timely request that the jurors be polled. However, 'there may be cases in which the likelihood of prejudice is so great as to require the trial judge to question the jurors *sua sponte* . . .'" *Id.* (citing *Perrotta,* 553 F.2d at 251 & n. 9; *United States v. Beitscher,* 467 F.2d 269, 274 (10th Cir.1972)).

[96] The cases of *Harper v. People*, 817 P.2d 77 (Colo. 1991), and *State v. Holly*, 201 P.3d 844, 848-850 (N.M. 2009), are instructive in our examination of whether we should adopt this standard in our jurisdiction.[22] The Colorado Supreme Court in *Harper* adopted a three-step process similar to the ABA standard for dealing with mid-trial publicity. *Harper*, 817 P.2d at 83. The defendant in *Harper* claimed he was denied a fair trial because the trial court failed to poll the jury after he provided the court with the news article he believed contained highly prejudicial information.[23] *Id.* at 80. Upon receiving the article, the trial court declined to question the jurors because the defendant failed to show that any juror had read the article. *Id.* The court of appeals applying the rebuttable presumption test, affirmed the conviction holding that absent a showing of actual juror exposure or prejudice to the defendant, the trial court's admonishments were sufficient. *Id.* The Colorado Supreme Court granted certiorari and held it was reversible error for the trial court to refuse to poll the jurors as to whether they had been exposed to the potentially prejudicial newspaper article. *Id.* at 81.

[97] In discussing the rationale of the rebuttable presumption test, the *Harper* court analyzed two important considerations. First, the court recognized that "requiring independent evidence

[22] Prior to the adoption of the ABA standard, the Colorado courts and the New Mexico courts applied a rebuttable presumption test. That is, if the jury had been instructed not to read or listen to any news reports about the trial, there is a presumption that the jurors followed the instruction, and the burden lies with the defendant to rebut the presumption. *Id.* at 847.

[23] The article in question discussed the defendant's prior conviction for sexual assault on a child, the same type of offense he was on trial for. *Id.* at 79.

of the jury's exposure to outside information as a prerequisite to polling the jury fails to acknowledge the significant obstacles to obtaining such evidence," because jurors and the parties or their counsel are not to communicate during trial.[24] *Id.* at 82. Additionally, ethical considerations prevent counsel from communicating with jurors during trial.[25] *Id.* Moreover, jurors are instructed not to discuss the case during trial with anyone including the attorneys for the parties. The court concluded that it is impracticable to overcome the rebuttable presumption test when evidentiary and ethical rules prevent juror communication during trial. *Id.* at 83. "In most cases, the defendant would have to wait for a juror to reveal voluntarily the fact of unauthorized exposure, an unlikely or at least unreliable circumstance on which to guarantee the accused's right to a fair trial before an unbiased jury." *Holly*, 201 P.3d at 848. The *Harper* court recognized the rebuttable presumption test was flawed because in some instances, jurors may acquire the information inadvertently without violating the court's instructions. *Harper*, 817 P.2d at 82.

[98] "This ban on direct contact with jurors significantly hampers a defendant's ability to procure independent evidence of jurors' actual exposure to prejudicial information. Realistically, such evidence would be unavailable unless volunteered. This leaves a defendant with little recourse when extremely prejudicial extraneous material has been published." *Id.* at 83. "A presumption that jurors follow court instructions not to permit themselves to be exposed to media reports, therefore, does not adequately take into account either the likelihood that a

[24] The Colorado Rules of Evidence 606(b) permits juror testimony about exposure to extraneous prejudicial information. Guam Rules of Evidence 606(b) which adopted FRE 606(b) similarly allows juror testimony about exposure to prejudicial information.

[25] Ethical rules in Colorado prohibit counsel from communicating with jurors or their family members during the trial. DR 7-108(B), (F). Guam Rules of Professional Responsibility 3.5 prohibits counsel from communicating with a juror during trial.

juror could acquire information without violating the court's instructions or the difficulty of discovering whether jurors were exposed to such a report. . . . [T]o resolve the issue of prejudice on the basis of such a faulty presumption fails to provide adequate protection for the defendant's constitutionally based right to a fair trial." *Id.* The *Harper* court determined that the published article presented potential for unfair prejudice. *Id.* at 85. Ultimately, the court found that the "trial court's "complete refusal to inquire about possible contamination constituted reversible error." *Id.* at 86.

[99] Recognizing the fundamental difficulties a defendant faces in obtaining evidence of actual exposure, the New Mexico Supreme Court in *Holly* abandoned the rebuttable presumption test in favor of the ABA standard set out above. *Holly*, 201 P.3d at 850. In considering adopting the ABA standard, the *Holly* court was persuaded by the reasoning in *Harper.* 817 P.2d 77 (Colo. 1991). The court said:

> The ABA standard would not appear to portend any significant burden upon our trial courts, which retain some degree of discretion in implementing the standard and will not be required to voir dire the jury on every occasion. Rather, under the ABA standard, courts are asked to exercise a more informed discretion by first making an initial determination about the prejudicial effect of mid-trial publicity. *See Brown,* 601 P.2d at 232. Only when mid-trial publicity presents a serious possibility of prejudice, does voir dire become mandatory. Therefore, by requiring voir dire when there is a sufficient possibility of prejudice, the ABA standard redresses the problem of accidental exposure.
>
> Perhaps most significantly, the ABA standard makes more realistic the defendant's burden of persuasion. The accused is no longer required to present evidence of actual juror exposure in recognition of the near impossibility of doing so. However, the overall burden of persuasion remains with the defendant to show that the material is inherently prejudicial, which in turn gives rise to an *inference* of prejudice sufficient to compel a voir dire. *Herring,* 568 F.2d at 1103. Upon canvassing the jury, the trial court will determine whether any actual exposure occurred, thereby eliminating the need for guesswork and conjecture.

Id.

[100] In assessing whether the mid-trial publicity is inherently prejudicial, the *Holly* court suggested the following factors a trial court should consider: "(1) whether the publicity goes beyond the record or contains information that would be inadmissible at trial, (2) how closely related the material is to matters at issue in the case, (3) the timing of the publication during trial, and (4) whether the material speculates on the guilt or innocence of the accused." *Id.* at 849. In addition, the court stated that a trial court should consider:

> [T]he likelihood of juror exposure by looking at (1) the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and (2) the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside materials, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material.

Id. "It is significant whether the trial court merely told the jury to disregard such material or whether the jury was properly instructed to avoid looking at such material altogether." *Id.* at 849-50.

[101] We are persuaded by the reasoning in *Harper* and *Holly* and adopt the ABA standard set out above which is followed by a majority of jurisdictions. We find this procedure appropriate in ensuring a defendant is not denied a fair trial. Generally, under this procedure the court must first look at the nature of the news material to determine whether the material is inherently prejudicial. Factors such as the timing of the media coverage, its possible effects on legal defenses, and the character of the material disseminated also merit consideration.[26] Second, if the material is found to be prejudicial, the trial judge must then ascertain whether any of the jurors were exposed to it by collectively questioning the jurors. Finally, if any jurors have been

[26] In the future, trial courts should therefore consider as a valid guide the factors set out by the *Holly* court.

exposed, the trial judge must ascertain the extent and effect of the exposure and decide what measures must be taken to protect the rights of the accused.

[102] We are cognizant that adoption of this standard may impose a significant burden on the trial courts. However, in applying this standard, a trial court maintains a certain degree of discretion and will not be required to poll the jury on every occasion. *Holly*, 201 P.3d at 850.

1. Flores Trial

[103] On the third day of trial, a KUAM news reporter interviewed Vawter outside the courtroom while she was waiting to be recalled to the witness stand. Before the jurors were excused for lunch on the day of the interview, the trial judge gave the jury the following instruction:

> I do want to be very clear with you on my admonishments for recess about not talking to each other about this matter, and more specifically, as the case continues through the days and the weeks, not to read anything in the newspaper. You know, don't even pick up a paper. If someone tries to tell you something about it, tell them to stop, walk away from them. Don't listen to KUAM or the radio. Just keep a clear mind on this one. It's very, very important.

Tr., vol. XII at 32 (Jury Trial, Sept. 13, 2005).

[104] At the end of the day, the court provided the following instruction to the jury:

> All right. Ladies and gentlemen of the jury, it may take just a little bit longer, so we're almost close to 5:00, I'm going to go ahead and release you for the day. Again, my utmost in admonitions. Don't talk about this matter amongst each other, with anybody, do not listen to any news media reports on this matter.

Tr. vol. XII at 140-41 (Sept. 13, 2005).

[105] That evening, KUAM television, a major source of local news, issued the following news story about the trial:

> <u>Best friend of murdered exotic dancer takes the stand</u>
>
> Now in its third day of trial, the murder case against Anthony C. Flores continued with the victim's best friend taking the witness stand today. In an effort to uphold

> her friend's reputation, Kimberly Calkins [sic][27] says even though she's dead, it's a shame people will never know how great a person Sherri Taylor and how she didn't deserve to be murdered.
>
> "A person never forgets the eyes of a murderer" that was what Calkins [sic] told us outside the courtroom when waiting to be called to take the witness stand in Flores' murder trial. Flores is accused of beating Taylor in her room in the Hamilton Hotel using a chair and phone in November 1999.
>
> Although records reveal Taylor died eight days after the beating, the exact cause of death is what attorneys on both sides are arguing. During Calkin's [sic] testimony today, the defense, represented by Attorney Phil Tydingco, attempted to convince jurors that Taylor died of liver cancer as opposed to the prosecution, represented by Basil O'mallen [sic], who maintains the victim died as a result of the beating by Flores.
>
> Attorney Tydingco questioned Calkins [sic] before Superior Court Judge Elizabeth Barrett-Anderson on the details of Taylor's drinking habits. When asked if Calkins [sic] would describe her friend as "being able to drink any man under the table", she admitted that Taylor could.
>
> However, in Calkins [sic] earlier testimony she described in detail, the night she discovered her friend beaten and bloody inside her hotel room in Anigua in which they both were living at the time. Calkins [sic] also revealed that on the night in question, a friend told her about a disturbance inside Taylor's room. That's when Calkins [sic] says she heard a wheezing sound through the closed door.
>
> After kicking and screaming outside the door, Calkins [sic] says a man wearing only blue jeans finally emerged from the room. Calkins [sic] claims she asked the man why he did what he did to Taylor and he looked her in the eyes and allegedly replied, "She got what was coming to her." Calkins [sic] said she returned upstairs to find Taylor lying on the floor with a phone cord wrapped around her neck and feet.
>
> Describing Taylor as "a very likeable and fun person, who was full of life" and "extremely athletic and fit", Calkins [sic] says it's a shame the former stripper will never be able to set the record straight and to be the great person she had the potential of being.
>
> Four previous indictments against Flores were dismissed by Guam Superior Court judges for various reasons. Trial resumes tomorrow.

ER, tab 10, Ex. A (Decl. of Counsel, Sept. 14, 2005).

[106] The news story was first shown at 6:00 p.m. on channel 8, then at 7:00 p.m. on channel 11 and finally at 10:00 p.m. on channel 8. ER, tab 10 at 2 (Decl. of Counsel, Sept. 14, 2005).

[27] Kimberly was also referred to as Kimberly Caulkins Vawter during the trial.

The story was also rebroadcast the next morning at 6:00 a.m. and accessible on the KUAM website. *Id.* The following morning, before the start of trial and outside the presence of the jury, counsel for Flores alerted the court of the news report. Flores filed a motion seeking (1) a mistrial, (2) a new trial, (3) an individual voir dire or sequester of the jury. The trial court denied Flores' request. ER, tab 11 (Mot. for Order to Show Cause, Sept. 14, 2005). Flores renewed his motion for a new trial and examination of the jury after the jury returned its verdict but the trial court denied the motion. ER, tab 6 (Mot. for New Trial, Oct. 17, 2005). A review of the news report and Vawter's testimony at trial reveals that several of the statements made included extraneous information. ER, tab 10, Ex. A (Decl. of Counsel, Sept. 14, 2005) While the news report was broadcast on the third day of trial, Vawter was the Government's first witness and the only witness who testified at the time she interviewed with the KUAM reporter.

[107] The news story generally described Vawter's testimony at trial. However, the report included statements by Vawter which were not before the jury. For instance, in the first paragraph, Vawter's statement that Taylor did not deserve to get murdered was not part of her testimony at trial. The second paragraph where Vawter told the reporter that "a person never forgets the eyes of a murderer" was also extraneous information. The third, fourth and fifth paragraphs recount Vawter's testimony at trial about the night of the alleged incident. Paragraph six partly describes Vawter's recollection to the jury about what happened on the night of the alleged incident. However, the statement that Flores looked Vawter in the eyes and allegedly replied "she got what was coming to her" was misquoted. Rather, at trial, Vawter did not testify that Flores looked her in the eyes but did testify that Flores responded, "she got what she deserved." Tr., vol. XI at 42 (Jury Trial, Sept. 12, 2005). In paragraph seven, Vawter is quoted as describing Taylor as "a very likeable and fun person, who was full of life" and "extremely

athletic and fit" and also that "it's a shame the former stripper will never be able to set the record straight and to be the great person she had the potential of being." This statement was not part of Vawter's testimony at trial. Vawter testified about seeing Taylor in jogging clothes, and that she would also see Taylor jogging. Tr., vol. XII at 12 (Jury Trial, Sept. 13, 2005). Vawter also told the jury Taylor was a wonderful person. Tr., vol. XI at 22 (Jury Trial, Sept. 12, 2005). Finally, the last paragraph about the dismissal of four previous indictments against Flores was also extraneous.

[108] The character of the material, inadmissible statements by a Government witness that a "person never forgets the eyes of a murderer" and an erroneous report that the witness claimed Flores looked into her eyes and stated "she got what was coming to her," is inherently prejudicial. The trial court found such a statement would be "clearly irrelevant and of no probative value to the jury," and therefore, inadmissible under either Rule 401 or 403. ER, tab 3 at 3 (Dec. & Order, Mar. 28, 2006). The judge's conclusion that the material was both irrelevant and may have been excludable under Rule 403, which governs exclusion of evidence that is unfairly prejudicial, suggests a recognition that the material was innately prejudicial.

[109] Information is prejudicial if it is substantially adverse to a defendant, has not been presented to the trial jury in court, and is not properly admissible in the trial. *United States v. Crowell,* 586 F.2d 1020, 1024 (4th Cir. 1978); *United States v. Jones,* 542 F.2d 186, 195 (4th Cir. 1976). In denying Flores' motion for a new trial and to voir dire the jury, the trial court stated that Flores had failed to show prejudice to the outcome of the trial "in light of the overwhelming amount of evidence." ER, tab 3 at 4 (Dec. & Order). Presumably, this finding was tantamount to a determination that no reasonable possibility existed that the material could

have affected the verdict, a determination which must generally be made upon a voir dire of the jury.

[110] The trial court concluded that Vawter's statements, although made outside the presence of the jury, were not the kind of information that vitiates a defendant's right to confrontation. Instead, the court found Flores was aware of the media comments, but chose not to confront the witness with regard to them during the witness' testimony. ER, tab 3 at 3) (Dec. & Order, Mar. 28, 2006). However, the court's recognition that such statements would generally be inadmissible, demonstrates that Flores' right to confrontation is not an adequate remedy, for it would have required the defense itself to introduce this prejudicial, non-probative evidence in an attempt to take the sting out of it.

[111] In basing its determination in part on whether the material impacted Flores' confrontation rights, we conclude that the trial court did not apply the proper standard in determining whether voir dire was necessary. Furthermore, in its decision, the trial court found "[i]t was within this Court's discretion to rely on the faithful obedience of the jurors to abide by its instructions." *Id.* at 4. Where potentially prejudicial material, if heard, would presumptively lead to prejudice, it is not within the court's discretion to refuse in some manner to inquire into a jury's exposure to the material. By declining to question the jurors, the trial court failed "to lay open the extent of the infection." *United States v. Gray*, 788 F.2d 1031, 1033 (4th Cir. 1986). Without information about the existence or the extent of actual exposure to the prejudicial information, the trial court was "unable to exercise its discretion to take appropriate measures to assure a fair trial." *Id.* Therefore, we find the trial court abused its discretion in not conducting a general voir dire of the jurors once alerted of the prejudicial material during trial.

2. Harmless Error

[112] Having determined that it was error to not question the jury of the news report, we next determine whether such error was harmless. The test for harmless error "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States,* 527 U.S. 1, 15 (1999) (quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)). The initial burden of demonstrating prejudice lies with the defendant. *State v. Duran*, 762 P.2d 890, 895 (N.M. 1988). Once this burden is satisfied, the burden shifts to the Government to show the error was harmless beyond a reasonable doubt. *State v. Holly*, 201 P.3d 844, 851 (N.M. 2009). While a defendant need not present evidence of actual juror exposure when applying the three step process, the overall burden of persuasion remains with the defendant to show the material was inherently prejudicial, which in turn gives rise to an inference of prejudice sufficient to require a voir dire. *Id.* at 850.

[113] The fact that no record exists of actual juror exposure complicates our analysis in applying the harmless error standard and determining whether the error contributed to the verdict and what effect any exposure may have had on the verdict. *Id.* at 851. Flores alerted the trial court of the news report immediately after it was shown and requested a voir dire of the jury during the trial and again when the verdict was returned. Flores has demonstrated that the extraneous material reported by KUAM was inherently prejudicial but was not able to show the effect if any, the report had on the jury because his requests for voir dire were denied. Even after the trial when the verdict was returned, the trial court could have questioned the jury about the report but did not do so. Having denied Flores' request, this court has no way of determining whether any of the prejudicial information reached the jury.

[114] As to the weight of the evidence on Flores' guilt, we previously explained how the Government presented sufficient evidence to sustain the verdict, therefore we will not repeat our analysis again. In the context of this issue, assuming however, the jurors were exposed to the news report describing Flores as a murderer and portraying Taylor as a fit and athletic person full of life, we believe this prejudicial material potentially could have contributed to the verdict. The timing of the news report was critical, as it was shown on the third day of trial where the only witness who testified was Vawter. The jury, if exposed to the news report, could have presumed Flores' guilt even before hearing testimony from other witnesses.

[115] The medical evidence on the cause of Taylor's death was also critical because of the conflicting testimony from the expert witnesses. If actual exposure was present, the jury after hearing the report about Taylor's lifestyle may have been persuaded by the testimony of Dr. Espinola that blunt force trauma caused Taylor's death and not believed the defense theory and testimony of Dr. Cohen that Taylor's drinking habits and bad liver caused her organs to shut down. Because there is no record that any of the prejudicial information actually reached the jury, this court would have to speculate what effect if any, the exposure may have had on the verdict. Since Flores' requests to question the jury even after the verdict was returned were denied, he had no other assurances that he was not denied a fair trial. We therefore find that the error was not harmless and accordingly reverse the judgment.

V. CONCLUSION

[116] We find first that the time period for calculating Flores' speedy trial violations under 8 GCA § 80.60 begins with the time Flores was arraigned in Criminal Case No. CF0191-02. In calculating the time period from the indictment in that case we find Flores was not brought to trial within the statutory time period under section 80.60. However, we conclude that good cause

was shown for the delay and that Flores' statutory speedy trial rights were not violated. We further find that in carefully applying the *Barker* balancing test, Flores' constitutional rights to a speedy trial under the Sixth Amendment were also not violated.

[117] We hold the trial court did not abuse its discretion in allowing the rebuttal testimony of Ryan "Vanessa" Gebhart, and that Flores failed to show he was prejudiced by the Government's late disclosure of the rebuttal witness or that a reasonable probability that, had the evidence been disclosed to him, the result of the proceedings would have been different. In viewing the evidence in a light most favorable to the Government, we conclude that the evidence was sufficient to sustain the verdict. Finally, we find that the trial court abused its discretion in not questioning the jurors about the mid-trial publicity. We therefore **REVERSE** Flores' judgment of conviction and **REMAND** this matter for a new trial.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice

Attachment A

		Asserted Time
May 8, 2002	Flores arraigned and speedy trial asserted. Jury selection and trial set for June 10, 2002.	
May 20, 2002	Motion for an expert witness filed by Flores	12
May 23, 2002	Ex parte motion to compel discovery filed by Flores	
May 24, 2002	Motion for investigator filed by Flores	
May 29, 2002	Order issued on discovery motion	
May 31, 2002	Motion to depose Dr. Elizabeth Cruz filed by Flores	
June 3, 2002	Hearing on motion to appoint investigator and expert and pre-trial conference. Jury selection and trial originally set for June 10, 2002 vacated pending motion to depose Dr. Cruz.	
June 4, 2002	Order appointing investigator and expert issued	
July 8, 2002	Hearing on motion to depose Dr. Cruz cancelled because of Tropical storm and reset to September 6, 2002.	
July 26, 2002	Motion to dismiss on res judicata grounds filed by Flores	
September 6, 2002	Hearing on motion to depose Dr. Cruz continued to October 4, 2002 because trial court was in a jury trial for another criminal case.	
October 4, 2002	Hearing on motion to dismiss on res judicata and motion to depose Dr. Cruz.	
October 23, 2002	Decision and Order issued on deposition and motion to dismiss	
November 25, 2002	Notice to take videotape deposition of Dr. Cruz off-island scheduled for January 17, 2003.[28]	
November 29, 2002	Order to conduct deposition issued	

[28] During the period of October 23, 2002 and December 2, 2002 Flores did not file any motions and no other motions were pending.

December 2, 2002	Interlocutory appeal filed[29]
December 5, 2002	Criminal trial setting hearing
January 14, 2003	Deposition of Flores' witness, Dr. Cruz.
January 27, 2003	Interlocutory Appeal dismissed
January 30, 2003	Continued criminal trial setting hearing. Flores waives speedy trial; Jury selection and trial set for July 18, 2003.
February 26, 2003	Motion to dismiss indictment filed by Flores
April 21, 2003	Hearing on motion to dismiss indictment.
July 2, 2003	Pre-trial conference.
July 8, 2003	Decision and Order issued on motion to dismiss; trial reset to July 18, 2003.
July 15, 2003	Ex parte Motion to withdraw as counsel filed by Attorney Louie Yanza
July 16, 2003	Hearing on motion to withdraw as counsel and motion in limine. Court denied motion to withdraw.
July 23, 2003	Ex parte motion to reconsider court's order denying motion to withdraw as counsel filed by Attorney Yanza
July 25, 2003	Hearing on second motion to withdraw. Court grant's Attorney Yanza's motion and appoints ADA as new counsel. Further proceedings set for July 29, 2003. Flores waives speedy trial for two weeks.
July 29, 2003	Hearing continued to July 30, 2003 ADA not present.
July 30, 2003	ADA unable to represent Flores because of conflict. Joaquin Arriola, Jr. appointed as new counsel. Further proceedings set for August 6, 2003.
August 6, 2003	Further proceedings hearing. Attorney Arriola raises potential conflict. Hearing continued to August 13, 2003.
August 11, 2003	Attorney Arriola relieved as counsel Attorney Peter C. Perez appointed as new counsel. Hearing set for August 13, 2003.

[29] Although no motions were pending during this period, the time is tolled because of the deposition of Flores' off-island expert witness Dr. Cruz.

August 13, 2003	Attorney Perez requests to withdraw due to potential conflict. Flores waives speedy trial on the record for one month to allow Attorney Perez to file the motion.[30]
October 2, 2003	Motion to withdraw as counsel filed by Attorney Perez. Hearing set for November 19, 2003.
November 19, 2003	Hearing on motion to withdraw. Court takes matter under advisement.
January 2, 2004	Decision and Order granting motion to withdraw filed by Attorney Perez. Attorneys Harold Parker and John Terlaje appointed as counsels for Flores.
January 6, 2004	Hearing with newly appointed counsel continued to January 23, 2004.
January 23, 2004	Continued hearing with new counsel. Attorney Parker relieved as counsel because of conflict. Attorney Mike Phillips appointed as co-counsel. Further proceedings set for January 28, 2004.
January 28, 2004	Further proceedings hearing with new counsel. Flores' counsel requests for a one week continuance to February 4, 2004.
February 4, 2004	Flores waives speedy trial pending the reassignment of his case to another judge.
February 16, 2004	Hearing before Presiding Judge Lamorena. Case assigned to Judge Barrett-Anderson and criminal trial setting set for March 1, 2004.
March 1, 2004	Criminal trial setting hearing. Court discusses status of case and continues hearing to March 2, 2004 to determine trial date.
March 2, 2004	Continued criminal trial setting. Trial set for August 16, 2004. Flores agrees to continue to waive speedy trial on the record to allow new counsel time to review case.
June 1, 2004	Flores filed a motion to dismiss indictment for speedy trial violations. Hearing scheduled for July 12, 2004.
July 12, 2004	Attorney Terlaje requests to withdraw from case at hearing; unable to work with Flores and Flores requested that Terlaje not represent him. Court denied motion to withdraw.

[30] Flores orally waived at the hearing and the trial court acknowledged the waiver.

July 15, 2004	Attorney Terlaje filed motion to reconsider denial of motion to withdraw. Court addressed motion at hearing and continued to August 9, 2004.	
August 9, 2004	Hearing on reconsideration motion. Court denies request to withdraw and sets continued hearing for August 12, 2004.	
August 12, 2004	Decision and order issued on motion to dismiss for speedy trial violation. At pre-trial conference trial date still set for August 16, 2004.	
August 13, 2004	Flores files an ex parte motion re competency to stand trial.	
August 16, 2004	Hearing to discuss competency of Flores. Trial date vacated and further proceedings set for December 6, 2004.	
August 17, 2004	Court orders forensic evaluation at hearing.	
September 2, 2004	Order issued for forensic evaluation	
December 13, 2004	Continued hearing; forensic report still pending; Flores asserted speedy trial.	
January 4, 2005	Evaluation report filed by Dr. Kiffer.	
January 11, 2005	Continued hearing; Flores' counsel requested for a competency hearing; continued hearing set for January 13, 2005.	
January 13, 2005	Competency hearing scheduled for February 14, 2005.	
February 14, 2005	Competency hearing and Flores' counsel renewed motion to withdraw from case; Attorneys Terlaje and Phillips relieved as counsel. Alternate Public Defender appointed as counsel for Flores.[31]	
February 14 – April 4, 2005	No motions by Flores were pending.	49
April 4, 2005 – August 30, 2005	Flores waived speedy trial	
July 18, 2005	Flores filed motion to dismiss for speedy trial violations	
August 24, 2005	Decision and order on speedy trial violations issued	

[31] The time period from when Flores re-asserted his speedy trial rights on December 13, 2004 to the appointment of the Alternate Public Defender as Flores' counsel is tolled because Flores' competency to stand trial was still a pending issue and was to his benefit.

August 30, 2005 Jury selection and trial

Total Number of Days excluding the tolled periods: 61